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Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

LEROY EDWARD TRUEX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether proof of involvement in one drug smuggling incident, with a core group of individuals, is sufficient evidence for a jury to find that the defendant agreed to participate in that core group's activities to the end of time, despite the absence of evidence that the defendant was involved in the subsequent activities or was aware that there were going to be subsequent activities?

2. Whether a conviction for a drug conspiracy is precluded by the Statute of Limitations, when the original indictment which charged a limited agreement relating to one incident is returned within the Statute of Limitations, but the Defendant is tried upon a superceding indictment filed beyond the Statute of Limitation which expanded the agreement beyond that charged originally and beyond the agreement entered into by the Defendant?

3. Whether the trial court erred pursuant to Rule 404(b), Federal Rules of Criminal Procedure in refusing to exclude second hand hearsay testimony that the Defendant had been introduced to a co-conspirator as having been involved in a previous unrelated drug incident, when the government utilized that testimony in closing argument to establish the Defendant's propensity to commit the crime charged?

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel on behalf of Petitioner, Leroy Edward Truex, hereby certifies that to the best of his knowledge and belief, the following is an accurate listing of all persons and entities with an interest in the outcome of this case.

BEN-VENISTE, RICHARD – Attorney for Defendant/Appellant LEROY TRUEX

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FAWSETT, PATRICIA C. – United States District Judge

FITZPATRICK, DONALD WAYNE – Defendant/Appellant

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT - Continued

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XIRAU, JULIO ANTONIO - Defendant/Appellant

This is a malum prohibitum case and there are no identifiable victims.

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OPINION BELOW

On December 1, 1993, the United States Court of Appeals for the Eleventh Circuit per curiam affirmed the conviction of Leroy Truex. (*App.* 9)

On December 17, 1993, Leroy Truex filed his suggestion for Rehearing and Rehearing En Banc. On January 14, 1994, the Eleventh Circuit denied that combined petition. (*App.* 10-11)

JURISDICTION

Grounds for invoking the jurisdiction of this Court:

i. The judgment of the United States Court of Appeals for the Eleventh Circuit of which review is now sought, was entered on December 1, 1993 (*App.* 9), and the Petition for Rehearing, and Suggestion for Rehearing En Banc was denied on January 14, 1994. (*App.* 10-11)

ii. This petition is timely filed within the prescribed ninety days from denial of the combined Petition for Rehearing, Suggestion for Rehearing En Banc, pursuant to United States Supreme Court Rule 13.4. This Court's jurisdiction is invoked under Title 28, United States Code § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved herein:

UNITED STATES CONSTITUTION AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any

person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FEDERAL RULES OF CRIMINAL PROCEDURE,
RULE 8. Joinder of Offenses and of Defendants

(b). Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

FEDERAL RULES OF EVIDENCE,
RULE 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

FEDERAL RULES OF EVIDENCE,
RULE 404 (b). Other crimes, wrongs, or acts.

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

TITLE 18 U.S.C. § 3282, Offenses not capital.

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

TITLE 21 U.S.C. § 952(a),
Importation of controlled substances

Controlled substances in schedules I or II and narcotic drugs in schedules III, IV or V; exceptions.

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United States from any place outside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in Schedule III, IV, or V of subchapter I of this chapter, except that –

(1) such amounts of crude opium, poppy straw, concentrate of poppy straw, and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States . . . may be so imported under such regulations as the Attorney General shall prescribe. No crude opium may be so imported for the purpose of manufacturing heroin or smoking opium.

TITLE 21 U.S.C. § 963. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

i. Statement of the Facts.

Leroy Truex was charged in this cause, by way of a second superseding indictment, along with 17 co-defendants. While there were three counts, Mr. Truex was charged only in counts two and three. Count Two charged Mr. Truex with conspiracy to possess with intent to distribute in excess of 100,000 pounds of marijuana. Count Three charged conspiracy to import in excess of 100,000 pounds of marijuana.

At trial the Government's witnesses revealed five importation schemes, which the Government alleged made up the conspiracy.

(1) *The "Three Hatteras" Conspiracy*. A November 1984 incident in which Parker Charles Peak and Peter Schnaedelbach off-loaded approximately 36,000 pounds of marijuana from a freighter onto three smaller Hatteras boats near Hurricane Hole in the Bahamas (R27-2796, 2804). The marijuana was subsequently imported into Florida. (R27-2805). While Defendants Juan Cruz Peron, Reginaldo Blanco, and Ramon Corugedo supplied the marijuana (R27-2797), and Defendants James Mark Barlow and David Wayne Fitzpatrick were involved in the scheme along with unindicted co-conspirators Robert Van Horn, William J. Harvey and David Monk (R27-2800, 2805, 2809, 2811-15), it was clear that Barney Truex had

no involvement or knowledge of the "Three Hatteras" scheme (R12-888).

(2) *Fatuk Conspiracy*. A scheme in which Robert Castoro and unindicted co-conspirator Billy Harvey agreed to import into the United States approximately 56,000 pounds of marijuana, hidden under a load of frozen fish. (R8-402, 403; R8-419-25; R12-1052). Castoro, Harvey, Peak, Monk, Espinosa, and Schnaedelbach were involved in this conspiracy. Evidence of Truex's involvement consisted of his discussion of utilizing a Cape Charles, Virginia dock for the off-loading of the marijuana into the United States. Truex eventually refused to allow the dock to be utilized (R8-429, R30-2877, R21-2252, R8-462), and from that point forward Truex had no stake in the "Fatuk" conspiracy, had no further discussion with the co-conspirators, nor any further involvement with any conspirators. (R12-889).

(3) *Saja Conspiracy*. A spring of 1985 venture in which Castoro planned to import a load of marijuana to Portland, Oregon (R8-474-81). Also involved were Harvey, Peak, Espinosa and Blanco. Truex had no knowledge of, nor involvement in, the Saja scheme (R12-889-90, R33-3383).

(4) *Sylvia Beacon Conspiracy*. A 1986 scheme utilizing a freighter to off-load 25,000-30,000 pounds of marijuana onto a number of smaller boats near Sylvia Beacon in the Bahamas (R8-486-89). Involved were Peak, Schnaedelbach, Harvey, Van Horn, Blanco, Corugedo, Peron, Fernando Gayo, Julio Xirau, and Luis Carillo (R8-484, 488). Mr. Truex had no knowledge or involvement in the Sylvia Beacon scheme (R12-891, R33-3582, 3584).

(5) *DC-6/Fort Stockton Conspiracy*. A 1987 scheme to transport a load of marijuana aboard a DC-6 airplane from Columbia to Mexico. (R8-501-04, 51). Involved were Blanco, Harvey, Xirau, Gayo and Octavo Marinello. Mr.

Truex again had no knowledge or involvement in this scheme. (R8-501, R12-892, R33-3582, 3584).

Despite objection at trial and uncontroverted testimony that Mr. Truex was not involved in the "Three Hatteras", "Saja", "Sylvia Beacon" or DC-6/Fort Stockton schemes, the Court allowed evidence of the schemes to be admitted against Mr. Truex. (R8-401, R12-480, R8-484-84, R8-501).

The only evidence the jury had that Mr. Truex was involved in criminal activity other than the "Fatuk" incident was Robert Castoro's testimony that Mr. Truex had been introduced by Billy Harvey as having had prior dealings with an unrelated drug smuggler named Pee-Wee Griffin.

The trial testimony concerning Mr. Truex was very limited and brief. That testimony primarily came from Government witnesses Robert Castoro[1] and Charles Peak[2].

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[1] Robert Castoro is an individual who had organized numerous importations of marijuana from 1974 until his arrest in 1987 (R8-367-69, R10-572). At the time of trial, Castoro was serving a sentence of life imprisonment without the possibility of parole, plus sixty-five years (R8-369). He testified at defendant Truex's trial in the hope of a sentence reduction (R8-369-70). In addition, Castoro faced charges, which had not been brought at the time of this case for importation of 500 kilograms of cocaine into Florida in 1986 (R30-2915, R2968-83).

[2] Parker Charles Peak is a convicted murderer and career criminal who had participated with Robert Castoro in marijuana importation episodes from time to time over a number of years. Peak pleaded guilty to the instant indictment and testified for the government in the hope of leniency and a reduction of the ten-year sentence he was already serving on another narcotics conviction (R21-2214-15, R27-2791, R30-2902-03). In addition, Peak faced charges, not yet brought, for his role in the importation of 500 kilograms of cocaine into Florida during 1986 (R30-2926, 2968-83).

Peak testified that in September or October of 1984 he traveled to Cape Charles, Virginia with David Monk and Biliy Harvey, (R27-2821), and they went to a dock in Cape Charles, Virginia where Peak for the first time saw Barney Truex. (R27-2821). Although Peak did not talk with Truex at that time (R27-2821), after Billy Harvey had some unknown conversation with Mr. Truex at the dock (R27-2821, 2822, R30-3025) and Monk and Peak took photo's of the dock (R27-2822, R30-3023), Monk, Peak and Harvey traveled to Maryland (R27-2822) to a processing plant (R27-2822, R30-3024). At the processing plant there was a conversation with Truex in which the price of using the dock for off-loading was discussed (R30-3034) along with a discussion of using some of Mr. Truex's trucks in the off-loading scheme. (R27-2824, 2836). Mr. Truex immediately rejected the use of his trucks, (R27-2824, R30-3035), but, while agreeing to the use of the docks, would not finalize the deal until talking with his partner. (R27-2824). Truex was also to supply the captain to pilot the ship from open water to the dock (R27-2837, R30-3035).

The testimony indicates that the next time Mr. Peak saw Mr. Truex was in December of 1984, when Billy Harvey and Peak went to an Atlantic City dock belonging to Truex. At that time Harvey had a conversation with Mr. Truex during which Peak was not present. (R27-2842, 2844).

Peak testified to his next involvement with Mr. Truex as being a meeting in early January with Billy Harvey and Barney Truex at the Ft. Lauderdale Marriot Hotel. (R27-2846). During that conversation there were discussions about Barney Truex and his partner wanting some funds up front to use the dock. (R27-2846). Peak, Harvey and Truex then traveled to Marathon, Florida to meet with Truex's partner (R27-2846, 2847) named Dick.

(R30-3061). This trip was before January 8, 1985 (R30-3059). In Marathon, Harvey, Truex and Peak met with Truex's partner on a pleasure boat (R27-2847) and had a conversation (R27-2849) which lasted approximately 1½ hours (R27-2850). The discussion concerned money. Peak was willing to pay $10 a pound or, a minimum of a million dollars to use the dock. (R27-2849). Peak also agreed to pay the ship's captain who was to come out and pilot the ship to the dock. (R27-2840) (See R30-3061, 3064). After the conversation, Truex, Peak and Harvey returned to Ft. Lauderdale, (R27-2851) and dropped Mr. Truex off at the hotel (R27-2851).

Peak testified that in February of 1985 (R27-2858, 2859), Billy Harvey, Bob Castoro, Truex and Peak met in a motor home at Daytona. (R27-2859). During that meeting Castoro was introduced to Truex and final arrangements were discussed. (R27-2860). Peak remembered that Truex was introduced as the guy with the docks. (R27-2860).

Peak subsequently had dinner (R27-2868, R28-2874) with Castoro, Harvey and Truex at the Omni Hotel in Virginia. During that dinner Peak got the feeling they were not going to be allowed to use the dock. (R30-2877). Subsequently they (Peak and company) received a call saying they could not use the dock. (R30-2877). They told Harvey they would need to use a small boat from Truex (R30-2878). Castoro, Schnaedelbach and Eddie Pierce then traveled to the area of Cape Charles and according to Peak, met with someone who worked for Truex. Pierce, Schnaedelbach, Castoro and Peak then traveled to the dock. Castoro and Peak went out on a boat and traveled to meet the "Fatuk" (R30-2880), and rerouted the "Fatuk" to Fall River, Massachusetts (R30-2882). The only other conversation with Mr. Truex occurred when Peak, Castoro and others stopped at Truex's dock in Atlantic City.

(R30-2884) Peak only heard a portion of that conversation in which Truex said good-bye and good luck.

The Government's testimony revealed that Leroy Truex was not involved in any of the schemes except the "Fatuk" (R30-2932). There was no evidence to indicate that Mr. Truex agreed to be involved in the other schemes. (R30-2932).

Castoro testified that he first met Barney Truex in Daytona in February, 1985. (R8-406-407). Castoro testified that he was introduced to Truex by Billy Harvey who stated at the time of the introduction Truex was a friend of Pee Wee Griffin who had worked offloads previously. (R8-409-410). During that introductory conversation (R8-410), the size of the vessel Castoro would be using (R8-411) was discussed, along with the availability of the offload dock (R8-410) and the price to be paid to Truex (R8-411).

Mr. Castoro testified that Mr. Truex's next involvement was a meeting Castoro had with Barney Truex, Billy Harvey, and a third person at the Omni Hotel in Norfolk, Virginia. (R8-412). This meeting was in February, 1985. (R8-412). Mr. Truex then led Castoro to the area of the Cape Charles dock where Castoro met the owner of the dock and another individual. The owner and his companion then took Castoro to the dock. (R8-414-415).

Mr. Castoro testified that his next involvement with Barney Truex occurred subsequent to February 18, 1985, again at the Omni Hotel in Norfolk, Virginia. (R8-425-426). At that time Billy Harvey, Charlie Peak, Peter Schnaedelbach, Eddie Pierce and Mr. Truex met. (R8-425). After that meeting Castoro, Peak, Schnaedelbach and Eddie Pierce traveled to a small hotel in the Cape Charles, Virginia area. (R8-428-429). Shortly thereafter Mr. Castoro was advised that they could no longer use the Cape Charles dock.

Mr. Castoro's last contact with Barney Truex was after the "Fatuk" had been diverted to Massachusetts and Castoro, Peak, Pierce, and Schnaedelbach, while driving to Massachusetts, briefly stopped off at Mr. Truex's dock in Atlantic City. At Mr. Truex's dock, Billy Harvey and Castoro spoke to Mr. Truex who wished them well and stated that using the dock was out of his control (R8-462). Mr. Truex was not involved once the decision was made to divert the ship to Massachusetts. (R12-889).

It was clear that Mr. Truex was not involved in any of the activities other than the "Fatuk."

ii. Course of Proceedings in the Court Below

This is an appeal from a judgment of conviction following a four-week jury trial. Leroy Howard "Barney" Truex ("Truex") was tried along with eight co-defendants on a second superseding indictment (R3-430-1) that charged him with conspiracy to possess with intent to distribute in excess of 100,000 pounds of marijuana (Count II) and conspiracy to import in excess of 100,000 pounds of marijuana (Count III) through a series of transactions spanning a period of four years, 1984 through 1987.

The original indictment, returned on February 14, 1990, charged 19 defendants in five counts. (R1-1-1). Truex was charged in Counts II, III, IV and V, in which all defendants were named. Count II alleged conspiracy to possess with intent to distribute in excess of 90,000 pounds of marijuana. Count III charged possession with intent to distribute in excess of 90,000 pounds of marijuana. Count IV alleged conspiracy to import approximately 56,000 pounds of marijuana into the United States aboard the vessel "Fatuk." Count V alleged importation of the 56,000 pounds of marijuana aboard the vessel "Fatuk" on or about February 20, 1985.

A superseding indictment charging 18 of the original 19 defendants in three counts was returned on June 27, 1990. (R2-268-1). Truex was named in Counts II and III. Count II charged conspiracy to possess with intent to distribute in excess of 100,000 pounds of marijuana. Count III charged conspiracy to import in excess of 100,000 pounds of marijuana. Counts II and III listed 17 overt acts stemming from the seizure of the vessel "Fatuk" by the United States Customs officers on February 28, 1985. Defendant Truex was mentioned only in overt acts 8 and 16, which alleged that he had met with certain of the unindicted co-conspirators to discuss a possible off-load site for the "Fatuk."

The second superseding indictment, returned on October 24, 1990, again charged 18 defendants in three counts, but significantly changed the conspiracy from an agreement to import 56,000 pounds of marijuana aboard the "Fatuk," to an agreement to import in excess of 100,000 pounds of marijuana. Although defendant Truex was charged with participating in this ongoing single conspiracy, there were no allegations that he participated in anything beyond the "Fatuk" importation conspiracy which was charged in the first indictment.

Trial began on January 7, 1991, and concluded on February 6, 1991. The jury acquitted Truex on Count II, but convicted him of conspiracy to import in excess of 100,000 pounds of marihuana, Count III (R5-597-1), in violation of 21 U.S.C. §§ 952(a) and 963. On August 26, 1991, Truex was sentenced to a term of eight years' imprisonment (R6-772-1). Mr. Truex is currently incarcerated.

On November 13, 1991, United States District Judge Patricia C. Fawsett granted Mr. Truex's motion and memorandum for bond pending appeal finding that after hearing his case, that his appeal would raise a substantial

question of law or fact which may result in reversal. (*App.* 7).

Leroy Truex timely filed his Appellant Brief with the United States Court of Appeals for the Eleventh Circuit.

On November 16, 1993, oral argument was held before a panel of the United States Court of Appeals for the Eleventh Circuit. On December 1, 1993 that panel issued its order per curiam affirming Mr. Truex's conviction. (*App.* 9). On December 17, 1993 Leroy Truex filed his combined suggestion for Rehearing and Suggestion for Rehearing En Banc. On January 14, 1994, the Eleventh Circuit denied those petitions. (*App.* 10-11). Upon the return of the mandate Mr. Truex commenced serving his sentence.

iii. Basis for Federal Jurisdiction

Jurisdiction before the Eleventh Circuit was invoked pursuant to 28 U.S.C. § 1291. This petition follows pursuant to 28 U.S.C. § 1254(1).

REASONS FOR GRANTING WRIT

This case presents three important issues in regards to federal criminal jurisprudence, issues which arise frequently in the trial courts. The lower appellate court seriously erred in the disposition of each of those issues. Since the Eleventh Circuit's affirmance of Mr. Truex's conviction directly, although implicitly[3], conflicts with decisions of other United States Courts of Appeals as well as a decision of this Court, Leroy Truex's petition for writ of certiorari should be granted. Additionally, since the trend the Eleventh Circuit condones by its affirmance, that is, the expansive use of conspiracy prosecutions, is

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[3] Since no opinion was written.

offensive to the principals of justice and fair play, Leroy Truex asks that this Court review his case on the basis that the Eleventh Circuit's decision in this case is a departure from the accepted and usual course of judicial proceedings.[4]

The first issue on which the Eleventh Circuit erred, was in affirming Mr. Truex's conviction for participating in one large ongoing conspiracy involving five importation schemes and more than 100,000 pounds of marijuana, when the evidence was uncontroverted that Mr. Truex was involved and had knowledge of only one of those schemes involving 56,000 pounds. Since the evidence, when viewed in the light most favorable to the Government, showed that Mr. Truex had agreed only to join one scheme, the "Fatuk," and that he was not a participant in the other schemes, and in fact, was not even aware of the existence of any other importation schemes, the Eleventh Circuit's decision conflicts with this Courts decision in *Kotteakos v. United States*, 328 U.S. 750 (1946), the Tenth Circuit's decision in *United States v. Evans*, 970 F.2d 663 (10th Cir. 1992), and the Ninth Circuit's decision in *United States v. Brown*, 912 F.2d 1040 (9th Cir. 1990).

In *Kotteakos*, this Court reviewed a defendant's conviction in a case where the Government, similar to here, had charged one conspiracy, because there was a common participant in several conspiracies. Just as this Court did

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[4] The trend which the Eleventh Circuit's affirmance condones is the Government's frequent over-inclusion of several separate conspiracies in one large overreaching conspiracy. This trend has been criticized by other circuit courts. See *United States v. Evans*, 970 F.2d 663, 673-74 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1288 (1993); *United States v. Brown*, 912 F.2d 1040 (9th Cir. 1990; *United States v. Sperling*, 506 F.2d 1323, 1340-41 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 and, *cert. denied*, 421 U.S. 949 (1975).

in *Kotteakos*, the Eleventh Circuit should have reversed the conviction in this case.

In reaching its decision, the *Kotteakos* Court announced an analogy that has been frequently discussed and utilized in subsequent decisions. In that analogy, the Court compared a conspiracy to a wheel, with the hub being the common participants and the spokes the separate schemes. *Id.* at 755. In such a scenario unless there is a rim which connects the separate spokes, that is some interrelationship amongst the various schemes, there is in fact several conspiracies rather than just one. *Id. United States v. Evans*, 970 F.2d 663, 668 (10th Cir. 1992).

In *Evans*, the Tenth Circuit utilizing *Kotteakos* reversed a broad ranging drug conspiracy conviction on the basis that the government had failed to prove that the defendant had "agreed to participate in a conspiracy of such extensive scope as the one charged." *Id.* at 673. In reaching its conclusion, the primary criteria was an examination of what was the agreement or understanding which existed as to each defendant. *Id.* In doing so the Court found that "[t]he best way to assess a defendant's intended involvement in a conspiracy is to examine the conspiracy from the defendant's point of view." *Id.* at 674.

In *United States v. Brown*, 912 F.2d 1040 (9th Cir. 1990), the Ninth Circuit found that an individual's involvement in one of the criminal schemes did not necessitate that he was involved in the overall conspiracy which the Government alleged encompassed all of the schemes. The Court found that Mr. Brown's participation in a single transaction in furtherance of the overall conspiracy was not sufficient to implicate Mr. Brown in the overall conspiracy when there was no evidence that Mr. Brown "knew of other transactions, or that he knew there was any overall plan at all." *Id.* at 1044.

In *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975), the Second Circuit reversed several conspiracy

convictions on the basis that the government had failed to prove a common objective among the various criminal activities. There, the seven appellants were convicted under an indictment charging a single, overall conspiracy to violate federal narcotics laws. The appellants contended that the proof at trial showed at least four separate conspiracies. The court agreed:

> Our examination of the evidence reveals a sufficient basis for the jury to be satisfied beyond a reasonable doubt that each of the asserted transactions took place, but no evidence linking them together in a single, overall conspiracy. Indeed, the only common factor linking the transaction was the presence of [two common conspirators]. This type of a nexus has never been held to be sufficient. *Kotteakos v. United States*. . . . It is clear to us that the government has merely merged several conspiracies for the sake of convenience.

Id. at 155 (citations omitted). *See also United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964)(reversing convictions where numerous defendants were charged as part of a single, overall narcotics conspiracy, but the evidence was insufficient to show the existence of single scheme), *cert. denied*, 379 U.S. 960 (1965).

Other cases uphold this basic principle. In *United States v. Levine*, 546 F.2d 658, (5th Cir. 1977),[5] in the course of reversing for misjoinder, the Court ruled that proof of proximate or simultaneous conspiracies with one common conspirator was insufficient to establish the existence of a single conspiracy. As the Court stated:

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[5] In *United States v. Castro*, 829 F.2d 1039, 1045 n. 22 (11th Cir. 1987), the Court recognized that an intervening Supreme Court decision had vitiated *Levine's* holding that misjoinder was per se reversible error. However, the Court expressly reaffirmed the remainder of the *Levine* analysis.

> For a wheel conspiracy to exist, those people who form the wheel's spokes must have been aware of each other and must do something in furtherance of some single, illegal enterprise. *Blumenthal v. United States*, [332 U.S. 539, 556-57 (1947)]. Otherwise the conspiracy lacks "the rim of the wheel to enclose the spokes." *Kotteakos* [citation omitted]. If there is not some interaction between those conspirators who form the spokes of the wheel as to at least one common illegal object, the "wheel" is incomplete, and two conspiracies rather than one are charged.

546 F.2d at 663.[6]

While *Kotteakos, Evans* and *Brown* examined the issue in light of variance and *Bertolotti, Borelli* and *Levine* examined it in light of sufficiency of the evidence, in Mr. Truex's case the conclusion is the same regardless of whether the error is viewed as one of variance, sufficiency of the evidence or withdrawal.

In the case at bar, *Kotteakos, Evans, Brown, Bertolotti, Levine* and *Dennis* all stand for the proposition that the Eleventh Circuit erred in affirming Leroy Truex's conviction. When the evidence the Government presented is viewed in a light most favorable to the Government, it is still clear that the Government proved five conspiracies rather than the one broad overall conspiracy charged. The Government proved that there was a 1984 conspiracy to import 36,000 pounds of marijuana (the three Hatteras

---

[6] Similarly, in *United States v. Dennis*, 927 F.2d 1031 (7th Cir. 1990), the court reversed a conspiracy conviction because the evidence was insufficient to establish that Dennis was a member of the single conspiracy charged. While the evidence was sufficient to show that Dennis conspired with one of his two codefendants in one drug conspiracy, there was no evidence linking him to the single conspiracy charged in the indictment involving only Dennis's codefendants. *Id.* at 1033.

conspiracy) involving defendants Peron, Blanco, Corugedo, Barlow and Fitzpatrick along with unindicted co-conspirators. The evidence was clear however, that Leroy Truex had no involvement in, or knowledge of, the three Hatteras conspiracy (R12-888). The Government proved a 1985 conspiracy to import a load of marijuana into Portland, Oregon (the Saja conspiracy). This conspiracy involved Castoro, Harvey, Peak, Espinosa and Blanco. The evidence was clear that Leroy Truex had no knowledge or involvement in the Saja conspiracy. (R12-889-90, R33-3383). The Government proved a 1988 conspiracy to import 25,000-30,000 pounds of marijuana utilizing an offload site near Sylvia Beacon in the Bahamas (Sylvia Beacon conspiracy). The evidence was clear Mr. Truex had no knowledge or involvement in the Sylvia Beacon conspiracy (R12-891, R33-3582-3584). The Government proved a 1987 conspiracy to import a load of marijuana aboard a DC-6 airplane involving Blanco, Harvey, Marinello, Xirau and Gayo (Ft. Stockton conspiracy). The evidence was clear Mr. Truex had no involvement in the Ft. Stockton conspiracy (R8-501, R12-892, R33-3582, 3584).

Taken in the light most favorable to the Government, the one conspiracy the Government proved Leroy Truex had any involvement in was a conspiracy to import approximately 56,000 pounds of marijuana into the United States utilizing a Cape Charles, Virginia dock (the "Fatuk" conspiracy). The Government's evidence of Mr. Truex's involvement consisted of alleged co-conspirator's testimony that Mr. Truex had discussed the utilization of the dock for the marijuana offloading. The evidence was clear and uncontroverted that Leroy Truex refused to let the dock be utilized for the offloading, and from that point forward, Truex had no stake in the "Fatuk" conspiracy, had no further discussions with the co-conspirators

nor any further involvement nor any further involvement with their criminal acts (R12-889).

As a result even when the evidence is viewed in the light most favorable to the Government, the evidence at most shows that Leroy Truex was involved for a limited period of time in the "Fatuk" conspiracy, that involvement was entirely limited to the planned utilization of a dock to off-load the ship and he was not in any way involved in the "three Hatteras" or "Saja" conspiracies which preceded the "Fatuk" or the "Sylvia Beacon" or Fort Stockton conspiracies which followed the "Fatuk." Most importantly, the government failed to prove that Mr. Truex knew of the other conspiracies or that there was even an overall plan much less that Mr. Truex knew that there was an overall plan and intended to join a continuing series of importations of marijuana.

If a conviction on such evidence is allowed to stand, the war on drugs will have claimed a new victim. The perceived crisis resulting from the war on drugs will have eroded the constitutional guarantees of due process and the rule of law. Throughout our history there are numerous examples of our society's perceived "wars" which have torn asunder constitutional rights. One such example is the internment of Japanese Americans in concentration camps which was condoned as part of the war effort. Another example is the McCarthy era red scare in which representatives of the government conducted a witch hunt of American citizens because the war on communism was seen as more important than the presumption of innocence and due process. While the courts allowed the internment of Japanese Americans and the baseless accusation of communism against American citizens, later generations have come to realize the unjustness of such activities. Today the war on drugs has caused the courts to turn away from the principal judicial

function of preserving constitutional rights. The affirmance of this conviction by the Eleventh Circuit without a written opinion is an example of the casualties which occur when due process gives way to the expediency of convictions.

Mr. Truex's conviction should be reversed because the war on drugs has gone too far in this instance. The breadth of the governments overreaching is demonstrated by the prejudice which has occurred. The appellate court's error on sufficiency of the evidence requires a reversal and entry of a judgment of acquittal. If this case is decided on the basis of variance or withdrawal, however, Mr. Truex must also establish prejudice. *Kotteakos*.

Since the circuit court did not write an opinion, it is unclear as to whether the issue of harmless error was actually reached. An analysis of the facts of Mr. Truex's case in light of the statute of limitations however, reveals that the error of the Eleventh Circuit in allowing Mr. Truex's conviction to stand was prejudicial. The implied finding of harmless error is the Eleventh Circuit's second error.

As discussed above, the evidence when viewed in the light most favorable to the Government, showed only that Mr. Truex was involved in planning the use of a Cape Charles, Virginia dock for the off-loading of marijuana being transported aboard the "Fatuk." While Mr. Truex's involvement in that conspiracy ended approximately February 1985, when he told the co-conspirators they could not use the dock, the very last overt act of the "Fatuk" conspiracy was February 28, 1985, the date upon which the Coast Guard seized the "Fatuk." As also discussed previously, Mr. Truex had no further involvement in the "Fatuk" subsequent to his withdrawal from the conspiracy nor did he have any involvement in, or knowledge of

any of the smuggling ventures which occurred subsequently. Since the statute of limitations for this case was five years, 18 U.S.C. § 3282, the latest Mr. Truex could have been indicted was February 28, 1990, five years from the date of the seizure.

While the original indictment was returned on February 14, 1990, two weeks before the statute ran, Mr. Truex was not tried on the first indictment. The Government instead filed two superseding indictments, the first, on June 27, 1990 and the second on October 24, 1990, both of which were filed outside the five year statute of limitations.

In *United States v. Italiano*, 894 F.2d 1280, 1282 (11th Cir.), *cert. denied*, 111 S. Ct. 246 (1990), the Court held that a superseding indictment returned after the limitations period is timely only if the original indictment was timely when returned, is still pending,

> *and the superseding indictment does not broaden or substantially amend the original charges.* For purposes of the statute of limitations, the "charges" in the superseding indictment are defined not simply by the statute under which the defendant is indicted, but also by the factual allegations that the government relies on to show a violation of the statute.

(emphasis added) (citations omitted).

The second superseding indictment in this case significantly broadened and substantially amended the original charges by adding substantial new importation schemes into the conspiracy counts, including the "Three Hatteras" scheme, the "Saja" scheme and the "DC-6/Fort Stockton" scheme. Indeed, the second superseding indictment not only added additional importation schemes, but also clearly changed the object or agreement of the conspiracy to import. The first indictment charged a conspiracy to import marijuana specifically related to the

shipment aboard the "Fatuk." The language of the charge is unmistakable:

> defendants . . . did knowingly and intentionally combine, conspire, confederate and agree with each other . . . to unlawfully import into the United States from a place outside thereof, approximately 56,000 pounds of marijuana . . . aboard the vessel "Fatuk[.]"

(R1-1-4-5). The second superseding indictment, upon which Mr. Truex was tried, charged in Count III that the object of the conspiracy was to "unlawfully import into the United States from a place outside thereof, in excess of 100,000 pounds of marijuana. . . . " (R3-430-11). The second superseding indictment thus changed the object of the conspiracy from an agreement to import 56,000 pounds of marijuana aboard the "Fatuk" to a different and broader objective involving in excess of 100,000 pounds of marijuana, in the course of the numerous schemes outlined above. By changing and dramatically expanding the nature of the conspiratorial agreement from that charged in the original indictment, the second superseding indictment "substantially amended the original charges." Under *Italiano*, therefore, the second superseding indictment does not relate back to the filing of the original indictment. Since the only scheme in which Truex was named, the "Fatuk" scheme, was in fact a separate conspiracy as discussed above, the variance of the Government proving five separate conspiracies rather than the one charged was not harmless error. If the single conspiracy proven as to Mr. Truex had been charged rather than the broad conspiracy, the statute of limitations would have precluded a trial and conviction. As a result Mr. Truex's conviction for being involved in the large conspiracy involving five schemes, rather than the one conspiracy, which proof indicated that he actually

agreed to, was not harmless error, but was in fact prejudicial error.

The Government prosecution of the conspiracy charged in the second superceding indictment has the effect of eliminating the Statute of Limitations. Under the Government's theory one who agrees to partake in a specific criminal venture is liable for all future criminal acts of the co-conspirators.

An analogy of the Government's theory to the days of piracy would result in the contention that a sailor who was part of Captain Blackbeard's crew on the first voyage but who left after the end of that first sailing would be responsible for all the acts of Piracy committed by Blackbeard throughout his countless sailings thereafter, even if the sailor only intended to take part in the first voyage. Such a theory ignores the Statute of Limitations and due process of law.

Despite this violation of the Statute of Limitations the Eleventh Circuit affirmed Mr. Truex's conviction. The Eleventh Circuit's decision in this case is contrary to *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964), cited with approval *United States v. United States Gypsum Co.*, 438 U.S. 422, 465 (1978). As discussed above the lower court's opinion is also contrary to the Eleventh Circuit's own opinion in *Italiano*.

In *Borrelli*, the Second Circuit was faced with a factual scenario, which while more egregious and involving more continuity than the case at bar, involved the same legal concepts. Just as in Mr. Truex's case, in *Borrelli*,

> whether there was a single or several conspiracies was extraordinarily significant because, in addition to the questions with respect to the admission of declarations that are often presented, the issue bore importantly on the problem of the statute of limitations.

Id. at 383.

The *Borelli* court discussed the difficulty in applying the presumption of continuity to a conspiracy when that presumption of continuity is extended to individuals not in the core, but rather, those on the outer spheres who are indifferent to the continuity motive of the core group, such as Mr. Truex.

> The basic difficulty arises in applying the seventeenth century notion of conspiracy, where the gravamen of the offense was the making of an agreement to commit a readily identifiable crime or series of crimes, such as murder or robbery, see Developments in the Law – Criminal Conspiracy, 72 Harv. L. Rev. 992, 923 (1959), to what in substance is the conduct of an illegal business over a period of years. There has been a tendency in such cases "to deal with the crime of conspiracy as though it were a group [of men] rather than an act" of agreement. See 72 Harv. L. Rev. at 934. Although it is usual and often necessary to conspiracy cases for the agreement to be proved by inference from acts, the gist of the offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed as to each defendant. It is a great deal harder to tell just what agreement can reasonably be inferred from the purchase, even the repeated purchase, of contraband, than from the furnishing of dynamite to prospective bank robbers or the exchange of worthless property for securities to be subsequently distributed. Purchase or sale of contraband may, or course, warrant the inference of an agreement going well beyond the particular transaction. A seller of narcotics in bulk surely knows that the purchasers will undertake to resell the goods over an uncertain period of time, and the circumstances may also

> warrant the inference that a supplier or a purchaser indicated a willingness to repeat. But a sale or a purchase scarcely constitutes a sufficient basis for inferring agreement to cooperate with the opposite parties for whatever period they continue to deal in this type of contraband, unless some such understanding is evidenced by other conduct which accompanies or supplements the transaction.
>
> The view that if the evidence warrants the finding that some defendants were parties to a single agreement to sell contraband for a nine-year period, it necessarily does so as to every defendant who has conspired with them at any time for any purpose, is thus a considerable over simplification.

Id. at 384.

In regards to Mr. Truex, even when the facts are viewed in the light most favorable to the Government it is clear that his only agreement was to produce the dock for the off-loading of the "Fatuk," an agreement he later refused to honor.

As the *Borrelli* court stated, in order for a conviction to be appropriate in such a factual scenario, as here where the statute of limitation is applicable,

> [t]he Government must present evidence justifying the jury in finding beyond a reasonable doubt that the particular agreement into which a defendant entered continued into the period not barred by limitation, *Grunewald v. United States*, 353 U.S. 391, 397, 77 S. Ct. 963, 1 L.Ed. 2d 931 (1957), and the scope of this agreement must be determined individually from what was proved as to him. If, in Judge Learned Hand's well known phrase, in order for a man to be held for joining others in a conspiracy, he "must in some sense promote their venture himself, make it his own," *United States v. Falcone*, 109 F.2d 479, 581 (2d Cir.), aff'd, 311 U.S. 205, 61 S.

> Ct. 204, 85 L.Ed. 128 (1940), it becomes essential to determine just what he is promoting and making his own.

Id. at 385.

In the case at bar the uncontroverted evidence is the agreement which Mr. Truex agreed to join, the "Fatuk," at the very latest concluded on the date the "Fatuk" was seized, February 28, 1985.

In *Borelli* the court held that the Statute of Limitations issue entitled some of the defendants to a new trial in which a jury instruction addressing the Statute of Limitations had to be included. *Id.* at 386. The court based its directive on the finding that the Government proved that the core defendant had in fact agreed to join one, long running conspiracy. Since the Government failed to make such a showing in this case, if this Court accepts certiorari, Mr. Truex will be asking that this Court direct an entry of acquittal since as a matter of law the Statute of Limitations bars Mr. Truex's conviction.

This error evidenced by the Eleventh Circuit's affirmance of the Statute of Limitations issue was further compounded by the trial court's refusal to give Truex's proposed jury instruction on the point (R34-3933-36, 3957-58). The jury should have been told that if it found that the "Fatuk" scheme was a separate conspiracy, it would have had to acquit Truex on the statute of limitations ground. A defendant in a criminal case is entitled to have the jury consider any theory of the defense which is supported by law and which has some foundation in the evidence. *See, e.g., United States v. Dennis*, 917 F.2d 1031 (7th Cir. 1990) (reversing conspiracy conviction where trial court refused to give defendant's requested instruction). The issue of Statute of Limitations, when raised by the facts, is one such issue the defendant is entitled to an instruction on. *United States v. Borelli*, 336 F.2d 376 (2d Cir. 1964).

Lastly, the Eleventh Circuit erred in affirming Mr. Truex's conviction when that conviction was based on improper 404(b) testimony.

At trial, the government introduced evidence, over objection (R8-407-09), through the testimony of Castoro that when unindicted co-conspirator Billy Harvey introduced Truex to Castoro, Harvey stated that he had known Truex as an off-loader of marijuana, who had worked with Pee-Wee Griffin. (R8-410). The Government proffered no evidence to establish the details of the time, place, participants, amounts involved, or anything else regarding this activity.[7] Indeed, Peak, who testified that he was also present at this introduction, recalled no such statement. (R27-2860). The Government emphasized this testimony to the jury in closing argument, and argued that this testimony proved that Truex was himself a criminal who joined a conspiracy which he knew would include additional future ventures (R34-3972-73, R35-4293). Such an argument has no basis in fact, law or logic.

The admission of the improper 404(b) testimony was in error and contrary to the decisions of other circuits. *See United States v. Schwartz*, 790 F.2d 1059 (3d Cir. 1986) (reversing conviction for trial court's abuse of discretion in admitting evidence of other acts in drug case); *United States v. Foskey*, 636 F.2d 517, 523-25 (D. C. Cir. 1980) (same). It is fundamental that under Rule 404(b) of the Federal Rules of Evidence, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." While evidence of other acts is admissible for certain limited purposes where the probative value is not outweighed by the prejudicial impact, the government

---

[7] The Government never called Harvey as a witness.

did not purport to offer the evidence in question for any limited permissible purpose. Instead, the government used the evidence for exactly the wrong reason: to argue to the jury in summation that Truex was guilty of the crime charged, because the testimony concerning similar acts in the past established his criminal propensity:

> Now, Mr. Truex, knew there was an overall scheme going on, he used the docks before, he done [sic] off-loads before for Billy Harvey and his friends and he joined in this conspiracy one time, but he knew the continuing nature of it's [sic] activities.

(R35-4293).

Further, evidence of other acts is admissible only if the government proves that the defendant actually did the act. *Huddleston v. United States*, 485 U.S. 681, 689 (1988), *citing United States v. Beechum*, 582 F.2d 898, 912-13 (5th Cir. 1978) (*en banc*), *cert. denied*, 440 U.S. 920 (1979). Here, the trial court made no determination whatsoever on this critical issue, despite counsel's pointed objection:[8]

> Q. Now, how were you introduced to Mr. Truex? How did Billy Harvey make the introduction?

---

[8] Counsel for Truex repeatedly urged the court to focus on the required analysis. Thus, Truex moved for pre-trial disclosure of the government's intention to proffer evidence of other acts under Rule 404(b) (R2-285-1). The court denied the motion without opinion (R2-325-1). Truex then moved pretrial for an order *in limine* to prohibit the government from mentioning any prior acts in opening statement (R3-406-1). The court denied the motion. *Id.* Prior to the beginning of Castoro's testimony on direct, counsel for Truex advised the court that the government intended to introduce this testimony. The court deferred ruling on the issue (R8-361).

A. [Castoro] He told me this was a friend of his.

Mr. Ben-Veniste [counsel for Truex]: I object. This is a matter that we said we would pause for, I believe, on 404.

The Court: No, sir. I don't believe this was one.

Q. How did Billy Harvey introduce you to Barney Truex?

A. Introduced him as a friend of his that he had known to be a friend of Pee-Wee Griffin and worked marijuana deals, off-loads –

Mr. Ben-Veniste: Objection. This is the point that I made.

The Court: I understood your former objection and that's overruled.

(R8-407-09).

In refusing to conduct the required inquiry and analysis under Rule 404(b), the court committed reversible error. If the court had made the required inquiry, it would have been clear that Castoro's hearsay testimony concerning Harvey's bare assertion of Truex's prior acts was not sufficient to show that Truex had, in fact, committed these acts. *Beechum*, 582 F.2d at 913 ("[T]he Government must offer proof demonstrating that the defendant committed the offense."). The government failed to introduce evidence of any of the details of Truex's alleged prior conduct, including when, where, or with whom the alleged conduct occurred. *See Schwartz*, 790 F.2d at 1062 (reversing conviction for violation of Rule 404(b) because the "generalized nature of the testimony precluded any meaningful refutation"). The failure of the government to meet its burden on this issue should have precluded the admission of this testimony into evidence.

Moreover, it is clear that the only purpose for which the prosecutor sought admission of this evidence was to

persuade the jury to draw the inference not permitted by Rule 404(b), that Truex "acted in conformity" with his prior behavior on this occasion.

CONCLUSION

At trial the Government perpetuated a disturbing trend, which is frequently occurring in Federal District Courts. The Government charged several unrelated conspiracies as one large conspiracy, when the only tie between the separate conspiracies was some common defendants. If this trend is allowed to continue, the Government is free to charge every individual, who ever participated in any drug transaction with a single career drug trafficker (in this case Robert Castoro) as being involved in one large drug conspiracy. Such a situation is repugnant to our system of justice and is contrary to the decisions of this Court and the decisions of numerous circuit courts. If that practice is allowed to continue it will have the effect of repealing the Statute of Limitations. On that basis this Court should grant Leroy Truex's petition for Writ of Certiorari.

Whether this case is viewed in light of the law on variance, insufficiency of the evidence or withdrawal, the application of the Statute of Limitations makes clear that the error which occurred was prejudicial and therefore not harmless error. That error was amplified by the improper admission of Rule 404(b) testimony.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
Orlando Division

UNITED STATES OF AMERICA

V.

LEROY TRUEX
659 Main Street
Mayetta, NJ 08092

JUDGMENT IN A CRIMINAL CASE

(Filed Sept. 11, 1991)

Case Number: 90-23-Cr-Orl-19

Richard Ben-Veniste, Esq. (Retained)
Mark L. Horwitz, Esq. (Retained)
Attorney for Defendant

(Name and Address of Defendant)
THE DEFENDANT ENTERED A PLEA OF:

[_ guilty _ nolo contendere] as to count(s)____, and
_ not guilty as to count(s)_____.

THERE WAS A:

[_finding X verdict] of guilty as to count(s)Three of the Second Superseding Indictment.

THERE WAS A:

[_ finding X verdict] of not guilty as to count(s) Two of the Second Superseding Indictment.

_ judgment of acquittal as to count(s)_____. The defendant is acquitted and discharged as to this/~~these~~ count(s).

THE DEFENDANT IS CONVICTED OF THE OFFENSE(S) OF: beginning at a time unknown, but from at least on or

about December 1984 and continuing through on or about September 1987, in Volusia County, Florida, in the Middle District of Florida, and elsewhere, the defendant and others conspired to import into the United States from a place outside thereof, in excess of 100,000 pounds of marihuana, a controlled substance listed in Schedule I, of Title 21, United States Code, Section 812, in violation of Title 21, United States Code, Section 952(a), and certain overt acts as described in the Indictment were committed in furtherance of the conspiracy, all in violation of Title 21, United States Code, Section 963.

IT IS THE JUDGMENT OF THIS COURT THAT: on Count Three of the Second Superseding Indictment, the defendant shall be committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of EIGHT (8) YEARS, or until otherwise discharged as provided by law.

IT IS FURTHER ADJUDGED that on Count Three of the Second Superseding Indictment, the defendant shall pay a fine to the United States of America in the amount of ONE HUNDRED AND TWENTY-FIVE THOUSAND DOLLARS ($125,000.00), and such fine shall be paid within six (6) months.

CONDITIONS OF PROBATION

Where probation has been ordered the defendant shall:

(1) refrain from violation of any law (federal, state, and local) and get in touch immediately with your probation officer if arrested or questioned by a law-enforcement officer;

(2) associate only with law-abiding persons and maintain reasonable hours;

(3) work regularly at a lawful occupation and support your legal dependents, if any, to the best of your ability. (When out of work notify your probation officer at once, and consult him prior to job changes);

(4) not leave the judicial district without permission of the probation officer;

(5) notify your probation officer immediately of any changes in your place of residence;

(6) follow the probation officer's instructions and report as directed.

The court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within the maximum probation period of 5 years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

IT IS FURTHER ORDERED that the defendant shall pay a total special assessment of $50.00 pursuant to Title 18, U.S.C. Section 3013 for count(s) 3 of 2nd superseding indictment as follows:

and such assessment shall be due immediately.

IT IS FURTHER ORDERED THAT counts N/A are DISMISSED on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall pay to the United States attorney for this district any amount

imposed as a fine, restitution or special assessment. The defendant shall pay to the clerk of the court any amount imposed as a cost of prosecution. Until all fines, restitution, special assessments and costs are fully paid, the defendant shall immediately notify the United States attorney for this district of any change in name and address.

IT IS FURTHER ORDERED that the clerk of the court deliver a certified copy of this judgment to the United States marshal of this district.

_ The Court orders commitment to the custody of the Attorney General and recommends:

AUGUST 26th, 1991
Date of Imposition of Sentence

/s/ Patricia C. Fawsett
Signature of Judicial Officer

PATRICIA C. FAWSETT, US District Judge
Name and Title of Judicial Officer

Sept. 10, 1991
Date

RETURN

I have executed this Judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at
Date

_____, the institution designated by the Attorney General, with a certified copy of this Judgment in a Criminal Case

_____
United States Marshal

By _____
Deputy Marshal

_____

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

CASE NO.
90-23-CR-ORL-19

LEROY TRUEX,

Defendant.

ORDER

(Filed Nov. 13, 1991)

This case was considered by the Court at hearing held on October 31, 1991 on the Motion and Memorandum of hearing held on October 31, 1991 on the Motion and Memorandum of Defendant Leroy Truex to District Court for Order Complying With Federal Rule of Appellate Procedure 9(b) (Doc. No. 763, filed September 5, 1991), Minutes of the proceeding on Sentencing held on September 10, 1991 (Doc. No. 767), Judgment in a Criminal Case (Doc. No. 772, filed September 11, 1991), Motion and Memorandum of Defendant Leroy Truex for Bond Pending Appeal (Doc. No. 778, filed September 25, 1991), Government's Answer to Defendant's Motion for Bond Pending Appeal (Doc. No. 779, filed September 27, 1991) and Second Motion and Memorandum of Defendant Leroy Truex for Bond Pending Appeal (Doc. No. 792, filed October 17, 1991). Counsel for both parties and the Defendant were present at this hearing.

Upon consideration, the Court enters its Order **GRANTING** the Motions of Defendant Leroy Truex for Bond Pending Appeal (Doc. Nos. 778 and 792) as follows:

1. The Court finds that Defendant has shown by clear and convincing evidence that he is not a risk of flight, that he is not dangerous to the community, and that his appeal is not for purposes of delay and raises a substantial question of law or fact which may result in reversal or an order for a new trial. *See* 18 U.S.C. §3143. In addition, the Court finds that there are exceptional reasons why detention is not appropriate in that in the event Defendant prevails on appeal, he may have served by the time the appellate process is concluded all or substantially all of the sentence imposed if parole is granted.

2. As a condition of release pending appeal, Defendant shall provide a signature bond in the amount of his total net worth as reflected on the submission to the United States Probation Office made on behalf of Defendant by his attorney and reviewed at the hearing by the Court. This bond shall be secured in full by a pledge of all the Defendant's assets, whether owned individually or through a corporation, and those owned jointly with Defendant's spouse must also be pledged by an appropriate submission executed by Defendant's spouse.

3. While on release pending appeal in this case, Defendant shall comply with all the terms and conditions of release imposed by the United States Probation office for the United States District Court in the Middle District of Florida, Orlando Division, including but not limited to submission by Defendant to drug testing as requested by his probation officer.

4. The parties having submitted a proposed order acceptable to the Court securing the release of Defendant in accordance with the terms of this Order, and the parties having been present through counsel, with Mr. Truex, at a hearing on November 13, 1991, the Motions of Defendant Leroy Truex for Bond Pending Appeal (Doc. Nos. 778 and 792) are **GRANTED.**

DONE AND ORDERED at Orlando, Florida, this 13th day of November, 1991.

/s/ Patricia C. Fawsett
PATRICIA C. FAWSETT
UNITED STATES DISTRICT JUDGE

Copies to:

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-3571

D. C. Docket No. 90-23-CR-ORL-19

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH BONIDY, a/k/a "Jay";
JUAN CRUZ PERON, FERNANDO GAYO,
JULIO ANTONIO XIRAU, a/k/a "Julie",
DONALD WAYNE FITZPATRICK,
RAMON CORUGEDO, LEROY EDWARD TRUEX,

Defendants-Appellants.

Appeals from the United States District Court
for the Middle District of Florida

(December 1, 1993)

Before FAY, Circuit Judge, DYER and SMITH*, Senior Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.

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* Honorable Edward S. Smith, Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 91-3571

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JOSEPH BONIDY, a/k/a "Jay";
JUAN CRUZ PERON, FERNANDO GAYO,
JULIO ANTONIO ZIRAU [sic], a/k/a "Julie";
DONAL [sic] WAYNE FITZPATRICK, RAMON
CORUGEDO, LEROY EDWARD TRUEX,

Defendants-Appellants.

On Appeal from the United States District Court for the Middle District of Florida

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ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC
FOR APPELLANT LEROY E. TRUEX

(Filed Jan. 14, 1994)

Before: FAY, Circuit Judges, DYER and SMITH*, Senior Circuit Judges.

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* Honorable Edward S. Smith, Senior U.S. Dircuit [sic] Judge for the Federal Circuit, sitting by designation.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:
/s/ Peter T. Fay
UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

Supreme Court, U.S.
FILED
JUN 3 1994
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No. 93-1626

In the Supreme Court of the United States

OCTOBER TERM, 1993

LEROY EDWARD TRUEX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence at trial showed multiple conspiracies instead of the single conspiracy charged in the indictment.

2. Whether prosecution of petitioner was barred by the statute of limitations.

3. Whether the trial court improperly admitted evidence of petitioner's previous marijuana smuggling activities.

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In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-1626

LEROY EDWARD TRUEX, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 9) is unpublished, but the judgment is noted at 11 F.3d 165 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1993. A petition for rehearing was denied on January 14, 1994. Pet. App. 10-11. The petition for a writ of certiorari was filed on April 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiring to import marijuana, in violation of 21 U.S.C. 952(a) and 963. He was sentenced to eight years' imprisonment. The court of appeals affirmed. Pet. App. 9.

1. Petitioner was involved in a large marijuana smuggling operation run by unindicted co-conspirators Billy Harvey, Robert Castoro, and Parker Charles Peak. Gov't C.A. Br. 6. In November and December of 1984, Harvey and Castoro arranged with a group of Cuban co-conspirators to import a 50,000 to 100,000 pound cache of marijuana into the United States. *Id.* at 8. In November 1984, the first shipment of 36,000 pounds arrived in Florida via the Bahamas aboard three small Hatteras boats. Pet. 4.

In October 1984, Harvey and Peak began negotiations with petitioner, who had previously collaborated with Harvey on other marijuana smuggling ventures, for permission to unload the second shipment of marijuana at his dock in Cape Charles, Virginia. Gov't C.A. Br. 10. For a $1 million fee, petitioner agreed to permit the *Fatuk*, a boat ostensibly carrying frozen fish, to unload 53,000 pounds of marijuana at Cape Charles. *Id.* at 9-11. In January 1985, petitioner met with Peak and Harvey in Fort Lauderdale, Florida, and later in Marathon, Florida, to continue negotiations. In February 1985, he flew to Daytona Beach, Florida, to meet with Castoro. *Ibid.* Finally, Castoro and Harvey flew to Virginia to meet with petitioner and inspect the dock. *Ibid.*

After the *Fatuk* set sail for Cape Charles, petitioner informed Harvey that the co-owner of the dock had decided that they could not use it to unload the

contraband. Gov't C.A. Br. 11. Petitioner apologized for the change and explained that the matter was beyond his control. *Ibid.* Petitioner arranged for a small boat to meet the *Fatuk* and inform the captain of a new delivery site in Fall River, Massachusetts. *Ibid.* En route to Massachusetts, however, the *Fatuk* experienced mechanical problems and was seized by the Drug Enforcement Administration. *Id.* at 12.

Shortly after the failed *Fatuk* venture, the Cuban co-conspirators offered to let Harvey, Peak, and Castoro use their boat, the *Saja*, to smuggle another load of marijuana into the United States to offset the loss of the *Fatuk*'s 53,000 pound load. Gov't C.A. Br. 13. The *Saja* venture was ultimately abandoned, because the ship was being watched by Customs agents. Peak, Harvey, and Castoro used other means, however, to smuggle three more loads of marijuana into the country between 1985 and mid-1987.[1] *Id.* at 13-15.

2. On February 14, 1990, a five-count indictment was returned by a federal grand jury in the Middle District of Florida charging petitioner and 18 co-defendants with narcotics offenses.[2] On June 27, 1990, a three-count superseding indictment was returned charging petitioner in two counts with conspiring to possess in excess of 100,000 pounds of marijuana with intent to distribute

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[1] Those three loads of marijuana weighed, respectively, 35,000 pounds, between 25,000 and 30,000 pounds, and between 14,000 and 15,000 pounds. Gov't C.A. Br. 13-14.

[2] Petitioner was charged in four counts of that indictment with the following offenses: conspiring to possess in excess of 90,000 pounds of marijuana with intent to distribute it; possessing 90,000 pounds of marijuana with intent to distribute it; conspiring to import 56,000 pounds of marijuana aboard the *Fatuk*; and importing 56,000 pounds of marijuana aboard the *Fatuk* on or about February 20, 1985. See Pet. 10.

it, in violation of 21 U.S.C. 841 and 963, and conspiring to import in excess of 100,000 pounds of marijuana, in violation of 21 U.S.C. 952(a) and 963. The indictment alleged that both conspiracies were in existence between December 1984 and March 1985. Gov't C.A. Br. 2.

On October 24, 1990, a second three-count superseding indictment was returned. Counts Two and Three of the second superseding indictment alleged additional overt acts pertaining to marijuana importations that occurred after the failed *Fatuk* venture. In addition, the conspiracies were alleged to have been in existence between December 1984 and September 1987, rather than between December 1984 and March 1985. Petitioner was tried on the second superseding indictment. Pet. 11.

3. At trial, unindicted co-conspirator Castoro testified as a government witness. Through Castoro's testimony, the government introduced evidence that petitioner had imported marijuana on previous occasions with Harvey. Gov't C.A. Br. 68. Peak, another government witness, corroborated Castoro's testimony relating to petitioner's prior involvement in marijuana smuggling by testifying that petitioner told him that his docks had been used previously to off-load marijuana. *Ibid.* In its closing arguments, the government asserted that that testimony demonstrated petitioner's knowledge of the ongoing nature of the smuggling conspiracy into which he entered. Pet. 27; Gov't C.A. Br. 69.

At the close of the evidence, petitioner requested that the jury be instructed to acquit petitioner if it found that the *Fatuk* venture was a separate conspiracy, because the five-year statute of limitations would have expired on that offense. The court declined to give petitioner's proposed instruction, but it did administer the following multiple-conspiracies instruction:

With regard to the alleged conspiracy offenses alleged in Counts Two and Three, the Government must prove beyond a reasonable doubt the existence of the overall conspiracy charged in each Count. Proof of several conspiracies is not proof of the single, overall conspiracy charged in the Indictment unless one of the several conspiracies which is proven is the single conspiracy which the Indictment charges. What you must do is determine whether the single conspiracy charged in the Indictment existed between two or more conspirators. If you find that such conspiracy existed, then you must determine who were the members of that conspiracy.

If you find that a particular Defendant is not a member of a conspiracy or is a member of another conspiracy which is not the one charged in the Indictment, then you must acquit the Defendant. In other words, to find a Defendant guilty, you must find that he was a member of the conspiracy charged in the Indictment and not some other, separate conspiracy.

* * * * *

If you find that there were two or more separate agreements to participate in particular marijuana transactions, and that a particular Defendant joined one of the separate agreements, you must still acquit that Defendant unless you also find beyond a reasonable doubt that he had some understanding of the common purpose and goal of the overall plan charged in the Indictment with those who joined the other agreement or agreements that you have found to exist. In other words, if you find that a Defendant

> agreed to participate in one of the transactions engaged in by the larger conspiracy, but that he did not know of the essential features and purpose of that overall conspiracy as alleged in the Indictment, you must acquit him.
>
> * * * * *
>
> Proof that over the years separate unrelated transactions involving marijuana took place is not proof, without more, that a common plan or understanding existed for the continuing agreement alleged in the Indictment.
>
> * * * * *
>
> Therefore, if the government proves that a Defendant intended to participate in one of the ventures charged in the Indictment to possess with intent to distribute and import marijuana, but did not have knowledge of and did not intend to be a part of a continuing venture charged in the indictment which involved additional shipments of marijuana, then you must find the Defendant not guilty, for the Government would not have proven beyond a reasonable doubt that the Defendant intended to participate in the conspiracy charged in the Indictment.

Pet. C.A. Br. 27-28 (citing R5-589-11-15) (emphasis omitted). The jury found petitioner guilty of conspiring to import in excess of 100,000 pounds of marijuana, but acquitted him of conspiring to possess in excess of 100,000 pounds of marijuana with the intent to distribute it.

4. On appeal, petitioner claimed that the proof at trial established multiple conspiracies, not a single over-

arching one, and, therefore, that there had been material variance. Pet. C.A. Br. 31-37. Petitioner also argued that the district court impermissibly admitted evidence of his prior bad acts through Castoro's testimony, in violation of Fed. R. Evid. 404(b). Pet. C.A. Br. 44-47. Finally, petitioner contended that the district court erred in failing to give the jury instruction he requested regarding the statute of limitations. The court of appeals summarily affirmed. Pet. App. 9.

ARGUMENT

1. Petitioner first renews his claim that the proof showed multiple conspiracies, rather than the conspiracy charged in the indictment. Petitioner argues that there was therefore a variance between the indictment and the proof at trial. In addition, petitioner claims that the government's purported failure to prove the conspiracy charged in the indictment entitles him to an acquittal. Pet. 16. Petitioner's fact-bound claims do not merit further review.

a. To prevail on his variance claim, petitioner must demonstrate that any variance prejudiced his substantial rights. *Kotteakos* v. *United States*, 328 U.S. 750, 756 (1946). Petitioner does not claim surprise, or any other prejudice resulting from lack of notice of the charges against him. Nor does petitioner contend that the elements of the offense for which he was convicted were not set out in the indictment. Any such claims would be unfounded, because the overt acts concerning the *Fatuk* venture were pleaded in the indictment (Pet. 11) and the indictment contained all of the elements of the offense of a conspiracy under 21 U.S.C. 952(a) and 963. Because petitioner cannot demonstrate prejudice, his variance claim lacks merit. See *United States* v. *Miller*, 471 U.S. 130, 134-136 (1985) ("Convictions generally have been

sustained as long as the proof upon which they are based corresponds to an offense that was clearly set out in the indictment.").[3]

b. Petitioner's sufficiency claim is likewise unworthy of further review. Whether the government's evidence showed a single conspiracy or multiple conspiracies is a question of fact left to the jury. See *United States* v. *Friedman*, 854 F.2d 535, 561 (2d Cir. 1988), cert. denied, 490 U.S. 1004 (1989); *United States* v. *Tarantino*, 846 F.2d 1384, 1391 (D.C. Cir.), cert. denied, 488 U.S. 867 (1988); *United States* v. *Champion*, 813 F.2d 1154, 1165 (11th Cir. 1987); *United States* v. *Smith*, 789 F.2d 196, 200 (3d Cir.), cert. denied, 479 U.S. 1017 (1986). A reviewing court should not disturb a jury's determination that a single conspiracy existed, unless no rational trier of fact could have reached that conclusion. See *Glasser* v. *United States*, 315 U.S. 60, 80 (1942).

Moreover, as the lower courts have recognized, there can be separate agreements within a single overall conspiracy. *United States* v. *LaFraugh*, 893 F.2d 314, 318 (11th Cir.), cert. denied, 496 U.S. 911 (1990); *United States* v. *Diecidue*, 603 F.2d 535 (5th Cir. 1979), certs. denied, 445 U.S. 946 and 446 U.S. 912 (1980). As the Second Circuit has noted, "where there was proof of the single, overall conspiracy, the fact that there also was evidence adduced of other conspiracies or that the jury could have found two major conspiracies does not require a mandatory charge of acquittal." *United States* v. *Tramunti*, 513 F.2d 1087, 1108, cert. denied, 423 U.S. 832 (1975).

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[3] Petitioner makes no claim that the evidence at trial constructively amended the indictment, in violation of his Fifth Amendment right to be tried on an indictment returned by a grand jury. See *United States* v. *Miller*, 471 U.S. at 135-136.

Here, the scale of the operation allowed the jury to find that petitioner was aware that he was participating in a large, even if loosely structured, organization. The members had a common goal (the importation of large quantities of marijuana), which they accomplished through a common method (the use of sea-going vessels). The members of the organization depended on each other's assistance for the success of their importation ventures. The jury could properly find that each member was aware that the importation ventures required combined efforts and that completion of the operation required the complicity of members having no direct relationships. See, *e.g.*, *United States* v. *Agueci*, 310 F.2d 817, 827 (2d Cir. 1962), cert. denied, 372 U.S. 959 (1963). In sum, the evidence demonstrated all the requisite indicia of a single conspiracy. See *United States* v. *Brito*, 721 F.2d 743 (11th Cir. 1983); see also *United States* v. *Tramunti*, 513 F.2d at 1106.

In addition, the jury was instructed that it could not convict petitioner if it found that he was involved in discrete conspiracies, and not the broader conspiracy alleged in the indictment. That precaution guarded against conviction on the improper basis alleged by petitioner. *United States* v. *Dennis*, 917 F.2d 1031, 1033 (7th Cir. 1990); *United States* v. *Cambindo Valencia*, 609 F.2d 603, 625 (2d Cir. 1979), cert. denied, 446 U.S. 940 (1980). Petitioner's disagreement with the conclusion of a properly instructed jury does not warrant further review.

2. Petitioner next claims that his prosecution was barred by the statute of limitations. That claim lacks merit. Under 18 U.S.C. 3282, a superseding indictment is timely if the original indictment was timely and the charges in the two indictments are substantially the same. See *United States* v. *Italiano*, 894 F.2d 1280, 1282

(11th Cir.), cert. denied, 498 U.S. 896 (1990); *United States* v. *Gengo*, 808 F.2d 1, 3-4 (2d Cir. 1986); *United States* v. *Grady*, 544 F.2d 598, 602 (2d Cir. 1976). Petitioner concedes, as he must, that the original indictment was timely. Pet. 20. He contends, however, that the original indictment charged only "the *Fatuk* conspiracy," which was different from the conspiracy charged in the second superseding indictment on which he was tried. Pet. 19. That contention is based on the same erroneous premise that underlies petitioner's claim that the evidence was insufficient to convict him—*i.e.*, that the conspiracy charged in the second superseding indictment must be deemed "different" from the purportedly more limited "*Fatuk* conspiracy" if it is theoretically possible to characterize them as different.[4]

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[4] Petitioner also bases his limitations claim on his repeated assertion that he withdrew from the conspiracy at the time of the *Fatuk* venture. See Pet. 19-20, 22. A withdrawal defense, however, requires not only that a defendant have ceased participating in the conspiracy, but also that he either have disclosed the conspiracy to the authorities or at least have done some "[a]ffirmative acts inconsistent with the object of the conspiracy and communicated in a manner reasonably calculated to reach co-conspirators." *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 464 (1978). This Court has long held that a defendant who claims that he withdrew from the conspiracy must show some "affirmative action" constituting withdrawal. *Hyde* v. *United States*, 225 U.S. 347, 369 (1912). In *Hyde*, the Court ruled that a defendant's participation in a conspiracy continues whether or not he performs acts in furtherance of the conspiracy, and that "until he does some act to disavow or defeat the purpose he is in no situation" to assert a withdrawal defense. *Ibid.* In accordance with *Hyde*, the overwhelming majority of the courts of appeals have held that a defendant bears the burden of proving his withdrawal from a conspiracy. See, *e.g.*, *United States* v. *Dyer*, 821 F.2d 35, 39 & n.6 (1st Cir. 1987); *United States* v. *Borelli*, 336 F.2d 376, 388 (2d Cir. 1964) (Friendly, J.), cert. denied, 379 U.S.

The indictment charged and the jury necessarily found, however, that the *Fatuk* venture was merely a part of the broader conspiratorial agreement, not a separate "conspiracy."

There is no greater merit to petitioner's related claim (Pet. 25) that the district court erred in declining to charge the jury to acquit him if it found that the *Fatuk* scheme was a separate conspiracy, because that conspiracy would be barred by the statute of limitations. The district court instructed the jury to acquit petitioner if it concluded that the defendants were not members of the conspiracy charged in the indictment, but rather members of some other conspiracy or of multiple conspiracies. See pp. 5-6, *supra*. That instruction encompassed the instruction sought by petitioner, because both instructions required acquittal if the jury found that the *Fatuk* venture was a separate conspiracy. Petitioner was not entitled to have the same concept repeated to the jury in words of his choosing. See, *e.g.*, *United States* v. *Kim*, 884 F.2d 189, 193 (5th Cir. 1989); *United States* v. *Taylor*, 562 F.2d 1345, 1364 (2d Cir.), cert. denied, 432 U.S. 909 (1977).

3. Finally, petitioner renews his claim (Pet. 26-29) that the district court violated Fed. R. Evid. 404(b) by

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960 (1965); *United States* v. *Gillen*, 599 F.2d 541, 548 (3d Cir.), cert. denied, 444 U.S. 866 (1979); *United States* v. *Branch*, 850 F.2d 1080, 1082-1083 (5th Cir. 1988), cert. denied, 488 U.S. 1018 (1989); *United States* v. *Lash*, 937 F.2d 1077, 1083 (6th Cir.), cert. denied, 112 S. Ct. 397 (1991); *United States* v. *Granados*, 962 F.2d 767, 773 (8th Cir. 1992); *United States* v. *Russell*, 963 F.2d 1320, 1323 (10th Cir.), cert. denied, 113 S. Ct. 280 (1992); *United States* v. *Finestone*, 816 F.2d 583, 589 (11th Cir.), cert. denied, 484 U.S. 948 (1987). Petitioner did not establish a withdrawal defense at trial, and he is therefore precluded from treating his purported withdrawal of the conspiracy as an established fact in this Court.

permitting Castoro and Peak to advert to petitioner's previous experience smuggling marijuana with Harvey. That fact-bound claim is meritless.

Rule 404(b) provides that evidence of a defendant's other crimes, wrongs, or acts is not admissible "to prove [his] character * * * in order to show action in conformity therewith." The Rule, however, does not limit the evidence that may be admitted on the charge on which the defendant is being tried, or the introduction of extrinsic act evidence for any other relevant purpose, such as showing the defendant's intent or motive. As a leading treatise notes, "[o]nly one sequence of [evidential] hypotheses is forbidden in criminal cases by Rule 404: the idea that one who commits a crime probably has a defect of character, and that someone who has such a defect is more likely than others to have committed the act in question." 2 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 404(08), at 404-43 (1993). See also *Huddleston* v. *United States*, 485 U.S. 681, 687 (1988) (Rule 404(b) "protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character").

Petitioner argues that the government's 404(b) evidence was offered to show his criminal propensity. In fact, as confirmed by the government's closing arguments, the government offered the evidence to prove that petitioner's smuggling experience with Harvey demonstrated that petitioner was aware of the continuing nature of the smuggling conspiracy for which he was being tried, and that he knowingly joined that conspiracy. See Gov't C.A. Br. 69. That evidence was therefore properly admitted on the issue of petitioner's knowledge or intent, and it was especially relevant in light of petitioner's claim that he had no knowledge of any smuggling activity other than the *Fatuk* venture.

Citing *Huddleston*, petitioner also complains (Pet. 27-28) that there was insufficient proof that he engaged in the prior wrongs with Harvey, and that the district court erred by not making a preliminary determination that he had. But, as *Huddleston* made clear, the district court need not make "a preliminary finding * * * that the Government has proved the act by a preponderance of the evidence." 485 U.S. at 689. Rather, the court simply "decides whether the jury could reasonably find the conditional fact—here, that [petitioner had engaged in previous off-loads with Harvey]—by a preponderance of the evidence." *Id.* at 690. Two witnesses, Castoro and Peak, testified that petitioner told them that he had previously off-loaded marijuana with Harvey and that he had previously used his docks for marijuana off-loads. Gov't C.A. Br. 69. The district court therefore correctly determined that the evidence was sufficient for a jury to find, by a preponderance of the evidence, that petitioner had in fact done so.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1994